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IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

NO. 1479

CONSOLIDATION COAL COMPANY, Petitioner

v.

SOUTH-EAST COAL COMPANY, Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT
AND
APPENDICES

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IN THE

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NO. .....

CONSOLIDATION COAL COMPANY, Petitioner

v.

SOUTH-EAST COAL COMPANY, Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

To the Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Petitioner, Consolidation Coal Company, prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Sixth Circuit, entered November 18, 1970, affirming a judgment of the United States District Court for the Eastern District of Kentucky, Richmond Division, holding Petitioner and a codefendant liable in damages to Respondent under Sections 1 and 2 of the Sherman Act (15 U.S.C. §§ 1 and 2).

OPINIONS BELOW

The Opinion of the Sixth Circuit is reported at 434 F.2d 767, and is reprinted in Appendix A hereto, p. 2a. The unreported Memorandum of the District Court is reprinted in Appendix B hereto, p. 59a.

JURISDICTION

The judgment of the United States Court of Appeals for the Sixth Circuit was entered on November 18, 1970, at No. 19,622 therein, affirming the judgment of the United States District Court for the Eastern District of Kentucky, Richmond Division, against Petitioner and United Mine Workers of America in the sum of $7,566,356.00, with interest and costs.

On a timely application, Mr. Justice Stewart, by order dated January 26, 1971, ordered that the time for filing this petition for a Writ of Certiorari be extended to and including March 18, 1971.

The jurisdiction of this Court is invoked under 28 U.S.C. Section 1254(1).

Petitioner is informed that United Mine Workers of America — appellant in No. 19,623 in the Court of Appeals for the Sixth Circuit—is also filing a Petition for a Writ of Certiorari and has not therefore been made a party hereto.

QUESTIONS PRESENTED

1. Whether, in a case involving an alleged antitrust conspiracy between a union and a group of employers arising out of collective bargaining, the Learned Courts below acted in a way in conflict with applicable decisions of this Court when they disregarded the distinction between a forfeiture of exemption from the antitrust laws and a violation of those laws and also disregarded any separate consideration of the relevant antitrust issues, such as the rule of reason, and created a new *per se* antitrust violation?

2. Whether, in light of the applicable decisions of this Court requiring an agreement, or equivalent commitment, between a union and employer to impose labor standards on other bargaining units in order to justify antitrust liability, parallel conscious knowledge or "having in mind" may be considered by the jury as the equivalent of the requisite agreement or commitment either to constitute forfeiture of antitrust exemption or an antitrust violation?

3. Whether, in light of the applicable decisions of this Court, an admittedly legal collective bargaining agreement between a union and an employer can be the foundation for an antitrust violation if it is entered into with an anti-competitive intent or purpose?

4. Whether, in light of the applicable decisions of this Court, it was error, with respect to the "clear proof" rule, for the Court to instruct the jury in detail on the preponderance of evidence, and to make only passing reference to the "clear proof" rule and then to attempt to correct the error by later giving a disconnected and supplemental instruction on "clear proof" but without differentiating the preponderance of evidence rule from the "clear proof" rule and without differentiating the issues to which the two different standards of proof should apply?

5. Whether the District Court's handling of procedure and matters with respect to the impartiality of the jury, and its charge, and the approval of all thereof by the Court of Appeals, constituted such a departure from the accepted and usual course of judicial procedure as to call for this Court's supervision?

STATUTES

15 U.S.C. § 1. Trusts, etc., in restraint of trade illegal; exception of resale price agreements; penalty

Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal: * * * Every person who shall make any contract or engage in any combination or conspiracy declared by sections 1-7 of this title to be illegal shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding fifty thousand dollars, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court. July 2, 1890. c. 647, §1, 26 Stat. 209; Aug. 17, 1937, c. 690, Title VIII, 50 Stat. 693; July 7, 1955, c. 281, 69 Stat. 282.

15 U.S.C. § 2. Monopolizing trade a misdemeanor; penalty

Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding fifty thousand dollars, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court. July 2, 1890, c. 647, § 2, 26 Stat. 209; July 7, 1955, c. 281, 69 Stat. 282.

Statutes.

15 U.S.C. § 17. Antitrust laws not applicable to labor organizations

The labor of a human being is not a commodity or article of commerce. Nothing contained in the antitrust laws shall be construed to forbid the existence and operation of labor, agricultural, or horticultural organizations, instituted for the purposes of mutual help, and not having capital stock or conducted for profit, or to forbid or restrain individual members of such organizations from lawfully carrying out the legitimate objects thereof; nor shall such organizations, or the members thereof, be held or construed to be illegal combinations or conspiracies in restraint of trade, under the antitrust laws. Oct. 15, 1914, c. 323, § 6, 38 Stat. 731.

29 U.S.C. §106. Responsibility of officers and members of associations or their organizations for unlawful acts of individual officers, members, and agents

No officer or member of any association or organization, and no association or organization participating or interested in a labor dispute, shall be held responsible or liable in any court of the United States for the unlawful acts of individual officers, members, or agents, except upon clear proof of actual participation in, or actual authorization of, such acts, or of ratification of such acts after actual knowledge thereof. Mar. 23, 1932, c. 90, § 6, 47 Stat. 71.

STATEMENT OF THE CASE

This case began on April 26, 1966, when South-East Coal Company (hereafter "Respondent") filed a complaint against the United Mine Workers of America (hereafter "UMWA") and Consolidation Coal Company (hereafter "Petitioner") in the District Court for the Eastern District of Kentucky, Richmond Division (hereafter "District Court"). It claimed that UMWA and Petitioner, which acted through the agency of a multi-employer bargaining unit, Bituminous Coal Operators Association (hereafter "BCOA"), violated Sections 1 and 2 of the Sherman Act (15 U.S.C. §§ 1 and 2), causing damage to Respondent in the amount of $3,100,000.00, to be trebled to $9,300,000.00. Jurisdiction was based on the aforementioned sections of the Sherman Act and also Section 4 of the Clayton Act (15 U.S.C. § 15) (Jt. App. p. 7). There was a jury trial and verdict.

This is one of a group of cases[1] originating in the Sixth Circuit in which unsuccessful coal operators have claimed they were driven out of business by an alleged conspiracy between UMWA and BCOA. However, it is the first case which has come to judgment with a BCOA member, such as Petitioner, in the case.

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1. United Mine Workers v. Pennington, 381 U.S. 657 (1965); on remand, 400 F.2d 806 (6th Cir. 1968); *cert. denied,* 393 U.S. 983 (1968); Ramsey v. United Mine Workers, 265 F. Supp. 388 (E.D. Tenn. 1967); *affirmed by an equally divided Court,* 416 F.2d 655 (6th Cir. 1969); *reversed and remanded by Opinion of this Honorable Court,* 39 U.S.L.W. 4245 (1971); Tennessee Consolidated Coal Co. and Grundy, et al. v. United Mine Workers, 416 F.2d 1192 (6th Cir. 1969); *cert. denied,* 397 U.S. 964 (1970) (hereafter *Tennessee Consol* or *Consol*).

In the other cases, there were claims—and evidence —that there was a conspiracy to monopolize the TVA coal market, that UMWA had invested money in West Kentucky Coal Company which operated as a "fighting ship" to sell coal to TVA at predatorily low prices to drive the claimants out of that market, that UMWA by violence impeded or prevented claimants' operation in effectuation of the alleged conspiracy and that the claimants were so small that they could not mechanize fully to increase productivity and remain competitive.

Although the facts in the instant case relate to the alleged basic conspiracy, there was no evidence relating to the TVA market, West Kentucky Coal Company, or union violence. Moreover, Respondent was not a small operator. It is fully mechanized with sophisticated "continuous mining" machines and is classified by the United States Department of Labor in the No. 1—or largest—category of operating coal companies in the nation (Jt. App. pp. 536-37, 1138-39).[2] Here the Respondent's case grew out of and relied on the Protective Wage Clause (hereafter "PWC")[3] negotiated in 1958 as an amendment to the National Bituminous Coal Wage Agreement of 1950 (hereafter "NBCWA"). All agreements negotiated by UMWA since 1945 have been described as "National Agreements" (Jt. App. p. 1225).

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2. Herein, the indication, for example, "Jt. App. p. . . . ." refers to the Joint Appendix in the United States Court of Appeals for the Sixth Circuit, which has been certified to this Court. Reference to the Appendices attached to this Petition shall be referred to, for example, as "App. A p. . . . a." or "App. B p. . . . a." Page references in brackets in the Appendices hereto are to the Joint Appendix.

3. PWC is reprinted herein in Appendix E, p. 131a.

Statement of the Case.

The National Bituminous Coal Wage Agreement of 1950 ended a period of extreme labor strife in the coal industry which necessitated five seizures by the United States Government in order to preserve the supply of coal and created a threat of nationalization of the coal industry (Jt. App. pp. 986-87, 1481-82).

Respondent contended that paragraph A of PWC compelled, bound and "strait-jacketed" UMWA not to negotiate any agreement with any non-signatory on terms different than those contained in the 1958 amendment to the NBCWA—i.e., to impose the NBCWA terms on other bargaining units (Jt. App. pp. 1786-87). Respondent also contended that paragraph B of PWC bound and committed the operators not to purchase or handle, i.e., to "boycott", any coal not produced under the contract with UMWA (Jt. App. pp. 1786-87). That contention related to the fact that Petitioner had been the exclusive sales agent for Respondent since October of 1959 (Jt. App. p. 404). This was terminated by letter, dated December 30, 1961, by Respondent (Jt. App. pp. 434-35).

The jury's verdict came after a charge which disregarded the difference between a forfeiture of the labor exemption from the antitrust laws and a violation of those laws (App. C. pp. 93a-94a), which stated that the element of agreement or equivalent commitment requisite in this alleged antitrust conspiracy case could be satisfied by the parties "having in mind" that competitors could be harmed (App. C. p. 92a) that an admittedly legal agreement could be an antitrust violation if it were entered into with an anticompetitive intent or purpose (App. C. p. 91a), and which did not explain the difference between preponderance of evidence and "clear proof" or the issues to which each standard ap-

plies (App. C. pp. 82a-83a). The trial involved the creation of the atmosphere of a contest between the populace of eastern Kentucky on the one hand and UMWA and Petitioner on the other and certain events creating doubt as to the impartiality of the jury. The Court of Appeals affirmed.

REASONS FOR GRANTING THE WRIT

1. The Learned Courts below decided a federal question in a way in conflict with prior applicable decisions of this Court when they eliminated the distinction between forfeiture of the labor exemption from the antitrust laws and a violation of those laws, thus creating a new *per se* antitrust violation.

The Clayton Act (15 U.S.C. §17) has provided an exemption from the antitrust laws for legitimate labor activities — even though such activities constitute a Congressionally-sanctioned restriction on freedom of enterprise. Because it takes at least two to conspire, it should follow that the other party to the collective bargaining process may also claim the exemption or immunity. It would be unjust and impractical to permit any other conclusion.

Here, the District Court and the Court of Appeals completely ignored the employer's immunity correlative to that afforded labor unions. More significantly, those Courts also ignored the distinction between the question whether a labor union's activities take it outside the scope of the labor exemption from the antitrust laws and the different question, whether, once it is outside the scope of such exemption, there has been a violation of the antitrust laws.

Here, the Court of Appeals expressly equated a forfeiture of exemption from the antitrust laws with a violation of the antitrust laws when it said:

> "* * * when a labor union and an employer enter into a plan or scheme of the type which results in the union losing its exemption from liability under the antitrust law, that plan or scheme is by definition an unreasonable restraint under the antitrust laws." 434 F.2d at 755. (App. A p. 11a.)

That holding by the Court of Appeals is contrary to and in disregard of prior rulings by this Court in which the distinction between issues relating to exemption from the antitrust laws and a violation of the antitrust laws has been specifically recognized. *Meat Cutters Union v. Jewel Tea Co.,* 381 U.S. 676, 688-89 (1965); and *Apex Hosiery Co. v. Leader,* 310 U.S. 469 (1939).

In the *Apex Hosiery Co.* case, this Court stated as follows:

> "These cases show that activities of labor organizations not immunized by the Clayton Act are not necessarily violations of the Sherman Act." 310 U.S. at 512.

Mr. Justice White touched upon this at the oral argument in *Ramsey v. United Mine Workers* (hereafter *"Ramsey"*) on December 7, 1970. The distinction was specifically mentioned by Mr. Justice Douglas in his Dissenting Opinion in *Ramsey,* 39 U.S.L.W. at 4248. Because of the basis on which the majority of this Court reversed and remanded *Ramsey,* it was not necessary for those Justices who concurred in Mr. Justice White's Opinion to comment specifically on this point.

It is respectfully noted, however, that the language of this Court in the final sentence of the *Ramsey* majority opinion is open to some argument on this point:

> "Where a union, by agreement with one set of employers, insists on maintaining in other bargaining units specified wage standards ruinous to the business of those employers, it is liable under the antitrust laws for the damages caused by its agreed upon conduct." 39 U.S.L.W. at 4248.

Immediately preceding the aforesaid quoted sentence, this Court repeated a holding in *United Mine Workers v. Pennington,* 381 U.S. 657 (1965) (hereafter *"Pennington")* that the alleged agreement "'. . . was not exempt from the antitrust laws'."

It is submitted that this Court did not mean to create a new *per se* violation when it said "* * * it is liable under the antitrust laws * * *". Rather, it is submitted, this Court meant "* * * it is *responsible* under the antitrust laws (i.e., not exempt) *if circumstances under those laws impose liability."*

If, under the decisions of this Court, the forfeiture of the antitrust exemption is not equivalent to the finding of an antitrust violation, then it is important that the District Court here never submitted to the jury any of the basic guidelines (e.g., the rule of reason)[4] to be utilized in determining whether or not an antitrust violation existed. Every agreement — legal or illegal — creates some restriction on economic freedom. Reasonableness, however, must be judged in the context of *all* the circumstances. *Appalachian Coals, Inc. v. United*

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4. Standard Oil Co. of New Jersey v. United States, 221 U.S. 31 (1911).

States, 288 U.S. 344 (1933); *Board of Trade v. United States,* 246 U.S. 231 (1918).

Apparently this threshold error also motivated the Court of Appeals to ignore the District Court's erroneous and prejudicial instructions with respect to monopoly and oligopoly — although there was no evidence of such in the case. (App. C pp. 85a-86a).

Actually, here the Court of Appeals did not even conclude unequivocally that proof sufficient to warrant a finding that UMWA had waived its exemption from liability under the antitrust laws constituted a *per se* violation of the antitrust laws. To the contrary, the Court of Appeals stated merely that this is "[t]he conclusion which *can* be drawn from this language . . .". (Emphasis added.) 434 F.2d at 775. (App. A p. 11a.)

Further evidence of the Court of Appeals' lack of conviction in its holding can also be found in its recognition of the fact that a contrary interpretation of Mr. Justice White's decision in *Pennington* was reached by Judge Peck of the Sixth Circuit in *Lewis v. Pennington,* 400 F.2d 806, 813-14 (1968), cert. denied, 393 U.S. 983 (1968) (hereafter *Second Pennington*), and also by District Judge Wilson in *Ramsey v. United Mine Workers,* 265 F. Supp. 388, 399 (1967).

The future of collective bargaining and the continuing effort to reconcile the national labor policies with the antitrust laws should not rest with the equivocal holding of the Court of Appeals in the instant case, especially when that holding is in conflict with prior decisions of this Honorable Court, a prior holding by the same Court of Appeals in a companion case (*Second Pennington*) and a holding of a District Court in another companion case (*Ramsey*).

If this Honorable Court did intend, in *Pennington* and *Ramsey,* to create a new *per se* violation, it is respectfully submitted that this should be done expressly and not *sub silentio,* or by implication.

2. The Learned Courts below decided a federal question in a way in conflict with prior applicable decisions of this Court when they permitted the jury to conclude that "having in mind" or having "conscious knowledge" that a legal agreement could harm a competitor was the equivalent of an actual agreement which would constitute a waiver of exemption and a violation of the antitrust laws.

Here, the District Court equated "having in mind" that harm could come to a competitor with an actual illegal anti-competitive agreement, and the Court of Appeals affirmed on the basis that "conscious knowledge" could be equated with an actual illegal anti-competitive agreement. Thus, the Courts below made "having in mind" or "conscious knowledge" of harm to a competitor the only requisite for forfeiture of the exemption and an antitrust violation.

It is believed error for the Courts below to have equated "having in mind" or "conscious knowledge" with agreement at all, and it is greater error to apply it to both the forfeiture and violation aspects of the case.

In that connection, the District Court said:

> *"The thing which you will have to decide and which I will probably refer to again, there is nothing unlawful about that contract in itself;* but if it was entered into with the intention on the part of the signatories—the two defendants here—to

injure the plaintiff, *if they had that in mind,* that 'we are going to go into this contract because we know it will put South-East out of business; they can't meet the conditions; we are too big, too strong, and they cannot compete with us, cannot get miners to work for them, and they cannot sell their coal on the market because they do not have sufficient sales agency, so we will deliberately enter into this and they can't meet it; we will thereby profit by putting competitors out of business or seriously hampering his operation.'

"So, the issue is: *Did these two signatories have that thing of putting the South-East Coal Company out of business in mind, the time they signed the contract?*"[5] (Emphasis added.) (App. C. p. 92a).

This error was ratified and confirmed by the Circuit Court when it said:

"Third, if however the employers and union entered into this contract with the *conscious knowledge* or intent that it would be used to drive competitors out of business * * *, then a violation of the antitrust laws has occurred." (Emphasis added). 434 F.2d at 782. (App. A. p. 27a).

It would be unrealistic not to recognize that every employer knows, to some extent, that some of his com-

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5. Respondent was a signatory to collective bargaining agreements with UMWA until January of 1962, when Respondent cancelled its agreement (Jt. App. p. 436). A question of interest posed by these facts and the District Court's instructions are how UMWA and this Petitioner could have had "in mind" putting Respondent out of business in December of 1958, *at the time when* the collective bargaining agreement containing PWC was executed (Jt. App. p. 1922).

petitors will be affected—perhaps adversely—if they cannot meet the standards of a labor contract which it has entered, if such employer is the "first target" of the union's negotiating demands. In footnote 2 of *Pennington,* 381 U.S. at 665, this Court recognized that a union might legally adopt and implement a uniform wage policy, even though it might "suspect that some employers cannot effectively compete if they are required to pay the wage scale demanded by the union." Whether this Court desires to equate "suspicion" with "having in mind" as set forth by the District Court here or with "conscious knowledge" as set forth by the Court of Appeals and whether any of those concepts are to be considered the equivalent of a conspiracy to violate the antitrust laws are important matters to be considered by this Court.

The clear ruling to be drawn from *Pennington* and *Ramsey* is that a forfeiture of the exemption from the antitrust laws occurs if there is an express or implicit *agreement* (or equivalent commitment) by the union and coal operator employers, whereby the union agrees to impose certain labor standards upon other bargaining units. This Court's observation (381 U.S. at 668) concerning the necessity of a union's preserving its freedom to bargain makes it clear that this result is based on the fact that the union—as a consequence of such an agreement — loses its ability to change the otherwise *unilateral* policy of uniformity in its bargaining for other units.

Accordingly, it seems beyond question that the trier of facts must, preliminarily, determine whether there was an *agreement* (or equivalent commitment) by the union to impose certain labor standards

on other bargaining units. Where, as was determined and stated by the Lower Courts in this case, the *collective bargaining agreement is legal*, the trier of facts should be required to determine whether some other agreement or equivalent concert of action, either express or implied, existed.

Here the District Court did not instruct the jury to determine whether some other agreement (or equivalent commitment) existed, nor did it instruct them that such agreement (or equivalent commitment) must bind the union to impose certain labor standards on other bargaining units. To the contrary, it permitted the jury to infer an illegal anticompetitive agreement from the *legal* agreement (i.e., PWC) if the parties had "in mind" that it would have anticompetitive effects on respondent, and, as noted, the Court of Appeals affirmed on the basis of "conscious knowledge".

Traditional conspiracy considerations usually necessitate a finding of an agreement or concert of action or circumstances sufficient to justify an inference of agreement. Consciously parallel action alone will not, under the decisions of this Court, furnish the requisite proof of conspiratorial action.

In *Theater Enterprises, Inc. v. Paramount Film Distributing Corp.*, 346 U.S. 537, 541 (1953), it was stated that:

> ". . . this Court has never held that proof of parallel business behavior conclusively establishes agreement or, phrased differently, that such behavior itself constitutes a Sherman Act offense. Circumstantial evidence of consciously parallel behavior may have made heavy inroads into the traditional judicial attitude toward conspiracy; but

> *"conscious parallelism" has not yet read conspiracy out of the Sherman Act entirely."* [Footnote omitted.] (Emphasis added.)

The decisions of the District Court and Court of Appeals in this case would appear to be in clear conflict with that decision of this Honorable Court.

It appears that the principles enunciated by this Court in *Theater Enterprises* are being eroded by Circuit Courts—including the Sixth Circuit here—and there is actually a conflict among the circuits on this point.

The Eighth Circuit, in *Pevely Dairy Co. v. United States,* 178 F.2d 363 (1949), cert. denied, 339 U.S. 942 (1950), held that a finding of conspiracy based on circumstantial evidence will not stand unless the finding is wholly consistent with guilt and totally inconsistent with innocence.[6] In *Morton Salt Co. v. United States,* 235 F.2d 573 (1956), the Tenth Circuit refused to adopt this standard. The Ninth Circuit also rejected the *Pevely* holding in *C-O-Two Fire Equipment Co. v. United States,* 197 F.2d 489, 494 (1952), where it is stated:

> "We are not unmindful of the standard suggested in Pevely Dairy Co. v. United States, 8 Cir., 178 F.2d 363, 367, upon which appellants lay great stress . . . . But that is not to say, as appellants would have us do, that such a rule must be separately applied to each link in the chain of circumstances and if one such unit does not fit the standard then the whole is likewise vulnerable."

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6. Coca-Cola Bottling Co. of Black Hills v. Hubbard, 203 F.2d 859, 861 (8th Cir. 1953) overruled *Pevely* only to the extent that it held that ". . . since no exceptions were made to the instructions of the Court, they became the law of the case for determining the sufficiency of the evidence. . . ."

Under the Court of Appeals' decision here, if an employer, having in mind that a union has such well established and traditional policies of seeking industry-wide labor standards, is the first unit to bargain with the union and knows that what he does will set a standard for the industry and that some of his competitors cannot meet the standard, then the test of an antitrust violation will have been met, and a jury can find an antitrust violation.

Accordingly, the grant of certiorari is merited to redefine the principle and to resolve that conflict.

3. The Learned Courts below decided a federal question in a way in conflict with applicable decisions of this Court when they departed from the rulings of this Court in holding that an admittedly legal agreement could be the foundation for an antitrust violation if it was merely entered into with an anticompetitive intent.

Another question is vital here with respect to the element of "agreement" (or equivalent commitment) mentioned by Mr. Justice White in *Ramsey*. As pointed out above, the trial here was conducted by Respondent's counsel on the basis that PWC constituted a "straitjacket/boycott" agreement between UMWA and BCOA, acting as bargaining agent for Petitioner.

In the instant case, the District Court found and stated to the jury that PWC was legal but nevertheless permitted the jury to conclude that the legal agreement could constitute an antitrust violation if it were entered into with the *intent* that it should have an adverse effect upon a competitor.[7]

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7. In *Tennessee Consol,* the District Court charged the jury with respect to the manner of interpreting the

That course of action was ratified and confirmed by the Court of Appeals.

This brings into question the relationship of the actions of the Lower Courts here to the *Noerr*[8] and *Pennington* cases. It is submitted that those cases stand for the proposition that if an action is legal, then an anticompetitive intent or purpose will not make it illegal. In *Pennington,* this Court reversed the same Court of Appeals which had held that illegal purpose or intent could vitiate conduct which would otherwise be legal.

The *Noerr* and *Pennington* doctrines are salutary. To hold that every legal action is subject to the *ex post facto* veto of a jury if that jury concludes that such admittedly legal action was taken for an illegal purpose or intent could mean that every legal act could be the springboard for a foray into psychological investigation by laymen. There would never be any assurance that legal action is really legal.

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clause, and the jury clearly found that the clause was properly interpreted as a "strait-jacket/boycott" agreement. Such was not the case here, and this Court's denial of certiorari in *Tennessee Consol* does not, therefore, dictate a similar result here.

In *Ramsey,* the District Court and the Court of Appeals—responding to an allegation that PWC was a *per se* antitrust violation—concluded that the clause was capable of two opposite constructions and that the proper interpretation to be given it was one that did not result in a violation of law. A similar result was reached by the same Court of Appeals in *Second Pennington.*

In *Ramsey,* this Court declined to consider a further argument by petitioner with respect to the interpretation of PWC. Presumably that question will be reconsidered by the Court below on remand.

8. Eastern R.R. Conference v. Noerr Motors, 365 U. S. 127 (1961).

This is especially true in cases such as the present one. The paradox is highlighted here by the Court of Appeals' reliance upon the alleged fact that Petitioner discontinued handling Respondent's coal under PWC as evidence of the illegality of PWC (App. A p. 43a). Yet that was a consequence flowing from the admittedly legal provision—i.e., paragraph B of PWC.

If the decisions of this Court in *Noerr* and *Pennington* are to remain unchallenged, it is essential to determine whether and to what extent the Court of Appeals' decision in this case and the action of the Trial Court erode that rule of law. It is additionally significant that two cases, in the First and Ninth Circuits, seem to conflict with the *Noerr-Pennington* doctrine. *Whitten v. Paddock Pool Builders, Inc.*, 424 F.2d 25 (1st Cir. 1970), *cert. denied*, 39 U.S.L.W. 3149 (1971); *Trucking Unlimited v. California Motor Transport Co.*, 432 F.2d 755 (9th Cir. 1970).

4. The Learned Courts below decided a federal question in a way in conflict with applicable decisions of this Court when they erred with respect to the proper application of the "clear proof" rule recently discussed by this Court in *Ramsey*.

This Court's decision in *Ramsey* requires a determination whether the District Court and the Court of Appeals here properly applied the correct standard of proof.

Here the Court of Appeals said:

> "There is no basis in either the Sherman Act or the Norris-LaGuardia Act to indicate that to impose liability on a company named as a coconspirator

of a labor union for an antitrust violation, anything more than a preponderance of the evidence is necessary." 434 F.2d at 773. (App. A p. 7a).

In *Ramsey,* this Court decided that Section 6 of the Norris-LaGuardia Act (29 U.S.C. §106) requires clear and convincing evidence as to the authorization, participation in, or ratification of the acts allegedly performed. This Court also held that the aforementioned "clear proof" rule applies both to employee and employer organizations. 39 U.S.L.W. at 4247 note 8.

Here all parties requested a jury instruction on the clear proof rule. The District Court gave none but instructed in detail on the preponderance of evidence and made only passing reference to the clear proof rule. (App. C p. 83a). When attention was called to the matter, the District Court attempted to correct the error by later giving a disconnected and supplemental instruction on clear proof. (App. C pp. 102a-03a) However, the Court never instructed that the clear proof rule was different from the preponderance of the evidence rule that had been previously given in detail and never differentiated between issues involving substantive antitrust violations and issues with respect to authorization, participation in, or ratification of acts.

Here, the District Court's failure to instruct properly is greatly similar to the instructions condemned by this Court in *United Mine Workers v. Gibbs,* 383 U.S. 715, 737 note 29 (1966), where this Court noted that the possibility was strong that ". . . the jury either did not understand the phrase [clear proof] or completely overlooked it in the context of the lengthy charge given." Here the likelihood—if not certainty—of confusion is even greater.

This error is important here because there are agency issues in this case — particularly from the Petitioner's point of view.

Whatever may have been true in other cases of this nature where only UMWA was the defendant, it was here contended that the alleged conspiracy was effectuated by BCOA, a multi-employer bargaining unit, which allegedly acted as agent for Petitioner.

Throughout the case, objections were made and issues raised with respect to the authority of BCOA personnel to speak for that association or for the Petitioner and objections were made with respect to the authority of various persons to speak for UMWA. (Jt. App. pp. 743, 747, 756, 763, 771, 772, 773). BCOA records demonstrate (Jt. App. pp. 861-62) there was no authority to enter into an illegal antitrust conspiracy.

Under *Ramsey,* application of the clear proof rule to such issues is a matter of fundamental law, both as to UMWA and Petitioner.

The foregoing demonstrates that the District Court and the Court of Appeals contravened a rule of law laid down by this Court in failing to recognize that the "clear proof" rule applied to Petitioner—as well as UMWA—and also in failing to apply said clear proof rule to essential issues in this case.

5. The District Court's handling of procedure and matters with respect to the impartiality of the jury, and its charge, and the approval of all thereof by the Court of Appeals, constituted such a departure from the accepted and usual course of judicial procedures as to call for the exercise of this Court's supervision.

Procedurally, this case was tried throughout as though it were a contest between the populace of eastern Kentucky on one hand and UMWA and Petitioner on the other (Jt. App. pp. 887, 1633-34, 1775, 1804-05, 1824-26, 1839-40, 1844). This contravened the rule in *New York Central Railroad v. Johnson,* 279 U.S. 31[0], 319 (1929), where the creation, at trial, of a hostile atmosphere towards a corporate party from another section of the country was roundly condemned.

Significantly, from the procedural point of view, although the District Court refused Petitioner's requested instruction as to hearsay evidence in this alleged conspiracy case (Jt. App. pp. 1759-60), the *very same instructions,* word for word (including the *there* inapplicable "clear proof" rule), were given in the very next case[9] tried by the same District Court — also an alleged antitrust conspiracy (App. D p. 111a).

The District Court also refused to instruct the jury as to the "equal hypothesis" rule (Jt. App. pp. 1760-61), the importance of which has been the subject of this Court's teaching: *Pennsylvania R. R. Co. v. Chamberlain,* 288 U.S. 333 (1933). The Court of Appeals affirmed on the point. Again significantly, although the District Judge refused to give the "equal hypothesis" charge in this case, he gave a detailed and explicit "equal hypothesis" charge in the very next case he tried (See footnote 9, *supra*) (App. D pp. 111a-12a).

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9. Case No. 1800, styled Arnold G. Pessin and Rex C. Ellsworth v. Keeneland Association, University of Kentucky Research Foundation and the Bank of New York. (Portions of the instructions in that case were incorporated into the Joint Appendix filed in the Court of Appeal and reprinted herein in Appendix D p. 105a).

This rule is more than a negative way of stating that a plaintiff must sustain the burden of proof. Burden of proof relates to *all* the evidence. This rule guides the trier of fact in the determination of the weight of a particular inference to be accorded a *particular* item of evidence.

In *Ramsey,* the District Judge — sitting without a jury — applied the rule in considering the evidence. If a District Judge, sitting as a trier of fact, properly uses the rule, *a fortiori,* a jury should be instructed as to its use where it is the trier of fact. Significantly, the jury was instructed with respect to this rule in *Tennessee Consol.*

Procedurally, the District Court here denied motions for a directed verdict and motions for judgment n.o.v. because it believed that the decision of this Court in *Pennington* required the same. However, in *Pennington* (381 U.S. at 663) this Court relied upon the contention of a collusive bidding arrangement to drive the plaintiff from the "TVA spot market" as a basis for the denial of such motions. There was no such evidence here.

The last sentence in Footnote 2 of the same opinion (381 U.S. at 665) constituted an express statement that this Court in *Pennington* indicated no opinion as to the sufficiency of the other evidence.

Voir dire examination revealed that one juror had longstanding business relations with a son of one of Respondent's officers and stockholders (Jt. App. pp. 321-25). A challenge for cause was denied (Jt. App. p. 325). Later it was discovered that this same juror discussed the case with an attorney who had represented

Respondent and who was involved in antitrust litigation for a coal company (Jt. App. pp. 238-45). A post-trial motion to subpoena the juror for interrogation was denied (Jt. App. p. 244).

Also, during the trial, the Respondent's president engaged in conversation with two jurors in a hotel dining room, though other seats were available, and the District Court refused a mistrial on the ground that the Respondent's president ". . . didn't do anything intentionally" (Jt. App. pp. 1033-38).

The Lower Court's handling of these matters and the Court of Appeals' approval violated the precepts of this Court (*Mattox v. United States,* 146 U.S. 140 (1892); *Tumey v. Ohio,* 273 U.S. 510 (1926); *Coatings Corp. v. Continental Cas. Co.,* 393 U.S. 145 (1968)) that jurors and others who sit in judgment on the rights of parties must be free from external influences and must be completely impartial. Justice must not only be fair, but there must be the assurance of fairness by the complete exclusion of questionable influences.

A perusal of the charge by this Court (App. C pp. 69a-104a) is respectfully and urgently requested. That charge was inadequate, misleading, confusing and prejudicial. It is believed that a reading of the charge leads to the conclusion that in this complex case relating to the interplay between two basic national policies, none of the fundamental issues were delineated to the jury. The charge, both as a whole and in its individual parts, constituted fundamental error, making impossible the proper administration of justice in this case and meriting the supervision of this Court.

CONCLUSION

For the foregoing reasons this Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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